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Supreme Court of the United States

OCTOBER TERM, 1998

ESTEBAN ORTIZ, *et al.*,

Petitioners,

v.

FIBREBOARD CORPORATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF EXXON CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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CONSENT OF THE PARTIES

Petitioners and respondents have consented to the filing of this brief. Their letters of consent are being filed separately herewith.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae Exxon Corporation ("Exxon") is a leading oil and gas company with facilities and operations throughout the United States and the world. Exxon is a defendant in *In re EXXON VALDEZ*, No. A89-0095-CV (D. Alaska), consolidated litigation arising from the 1989 grounding of the tanker EXXON VALDEZ in Prince William Sound, Alaska. The litigation is one of the largest cases in this country's history, involving five compensatory damages classes, multiple subclasses, and thousands of direct action claimants. During the more than nine years of proceedings, the district court has entered over 350 pre-trial and post-trial orders, and the Ninth Circuit Court of Appeals has decided or has pending before it more than a dozen appeals.

During the *VALDEZ* litigation, Exxon requested and the district court certified a "mandatory" (*i.e.*, non-opt-out) punitive damages class under Federal Rule of Civil Procedure 23(b)(1)(B).[2] This certification made possible a single trial of all punitive damages claims arising from the

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* Exxon Corporation made any monetary contribution to its preparation or submission.

[2] *In re EXXON VALDEZ*, *supra*, Order No. 204 (D. Alaska Apr. 15, 1994). The Ninth Circuit denied a mandamus petition by certain plaintiffs challenging the certification, *Chugach Alaska Corp. v. United States Dist. Ct.*, No. 94-70174 (9th Cir. Apr. 28, 1994), and dismissed an interlocutory appeal for lack of appellate jurisdiction. *Chugach Alaska Corp. v. Exxon Corp.*, 26 F.3d 130 (9th Cir. 1994) (Table); *see Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

EXXON VALDEZ grounding and avoided the prospect of multiple punitive damages trials in federal and state courts by thousands of claimants alleging the same misconduct in connection with the same maritime accident.[3] The consolidation of punitive damages claims into a unitary, non-opt-out class is a landmark in the sensible and efficient use of class certification procedures under Rule 23(b)(1)(B), in a manner entirely consistent with the due process rights of class members.[4]

Petitioners in this case and the *amici* trial lawyer organizations that support them ask this Court to endorse the sweeping proposition that due process considerations mandate an absolute prohibition against certification under Rule 23(b)(1)(B) of any mandatory class alleging *in personam* claims for money damages. In Exxon's view, petitioners and their supporting *amici* seriously misread existing law and this Court's prior decisions -- especially *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) -- and propose an overbroad principle that wrongly precludes

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[3] The trial of the punitive damages class claims against Exxon resulted in a jury award of $5 billion on which the district court, after settlement of all remaining claims for compensatory damages, entered judgment. Exxon's appeal from that judgment is presently pending before the Ninth Circuit Court of Appeals. No party in the Ninth Circuit now challenges the mandatory class certification order.

[4] To be sure, Rule 23(b)(1)(B) certification of a mandatory punitive damages class is no constitutional panacea. Notwithstanding the benefits and protections it affords, the rule alone cannot guarantee that the amount of any punitive damages award is constitutionally permissible. In such cases, the district and appellate courts still must conduct substantive reviews of punitive damages awards to ensure that they are "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

legitimate and beneficial uses of mandatory class actions. Exxon accordingly urges this Court to decline petitioners' invitation to issue an absolute prohibition against mandatory limited fund class actions and to issue instead a pronouncement no broader than necessary to decide the factual issues that this case presents.

SUMMARY OF ARGUMENT

1. The law has long approved mandatory joinder of competing *in personam* monetary claims against a "limited fund." Federal Rule of Civil Procedure 23(b)(1)(B) recognizes this principle. It expressly authorizes certification of a mandatory class where the adjudication of separate suits by individual claimants would risk foreclosing or substantially impairing the interests of other claimants, as is so where numerous litigants seek recovery from a fund that may not be sufficient to satisfy all claims. Federal courts have invoked this provision to certify mandatory classes in mass tort and other multiple litigant cases where individual adjudication of the compensatory damages claims of initial claimants would risk depleting a defendant's assets before later claimants could be compensated. In the punitive damages context, courts have extended this principle to cases in which early claims would likely exhaust the constitutional limit on punitive damages awardable against a defendant for a single course of conduct, thus addressing also the vexing problem of seriatim, excessive multiple punishment. In both situations, the mandatory class procedure enables the equitable disposition of competing claims against a "limited fund," or *res*, much akin to interpleader actions, limitation of liability suits in admiralty and analogous equitable proceedings.

2. *Shutts* does not hold that such certification is unconstitutional. The due process issue in *Shutts* was purely

jurisdictional: whether a state could constitutionally bind class members not otherwise subject to personal jurisdiction within the state. The *Shutts* reasoning has no applicability in situations where a district court exercises jurisdiction over a *res*, thereby acquiring exclusive, equitable jurisdiction over all *in personam* claims against the *res*. The *Shutts* reasoning likewise does not apply in cases where class members all have minimum contacts with the forum state (as was indisputably so in the EXXON VALDEZ case), where they have expressly or impliedly waived any jurisdictional objection, where they are subject to nationwide service of process or a long-arm statute of the forum state, or where they are otherwise subject to the forum court's jurisdiction. Finally, *Shutts* did not speak at all to situations involving competing claims against a limited fund -- either in the punitive damages context or otherwise. The Court expressly declined to address the due process requirements for binding absent class members in class actions seeking "equitable relief," and recognized that the case before it did not involve a limited fund. *Id.* at 811 n.3, 820.

3. Given a proper reading of *Shutts*, Exxon does not believe there is any due process ground on which to preclude certification of the mandatory class in this case. But whether the Court agrees or disagrees, Exxon respectfully urges it to avoid issuing any opinion casting doubt on the propriety of mandatory classes in limited fund cases involving punitive damages claims. Such cases differ fundamentally from Rule 23(b)(1)(B) class actions involving competing compensatory damage claims against a limited fund and therefore should be considered separately. In contrast to compensatory damages claims, which involve competing "private interests," punitive damages claims concern only "collective," "public interests." *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1358 (11th Cir. 1996).

Certification of a mandatory punitive damages class thus implicates none of the concerns that, under the due process balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), May weigh in favor of the imposition of an additional procedural safeguard.

ARGUMENT

I. RULE 23(b)(1)(B) CERTIFICATION SERVES IMPORTANT AND LEGITIMATE PURPOSES IN CASES INVOLVING *IN PERSONAM* MONETARY CLAIMS AGAINST A LIMITED FUND.

Petitioners and their supporting *amici* agree that Federal Rule of Civil Procedure 23(b)(1)(B) permits certification of a non-opt-out class in appropriate cases involving competing claims against a "limited fund," but nevertheless argue that a "limited fund" exists only in constructive trust and analogous cases in which the fund is fixed and identified. However, neither the historical underpinnings of Rule 23 nor the bulk of recent cases interpreting it will support that conclusion. Rather, they make clear that certification under Rule 23(b)(1)(B) also may be appropriate where the resources available to satisfy competing claims against a defendant are limited, and there is a *risk* that those funds will be insufficient to satisfy all claims.

A. The Equitable Underpinnings Of Limited Fund Class Actions.

The modern-day mandatory class action has its roots in the seventeenth century English "bill of peace," a mandatory joinder device used in the chancery courts to bind entire classes of similarly situated claimants. *See* Zechariah Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297 (1932). Courts in this country have recognized

mandatory class actions at least since *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853), a case in which representatives of a plaintiff class of ministers sued to vindicate rights in a common fund. This Court upheld the suit on the ground that, in cases involving a "common interest or a common right," "[a] court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court." *Id.* at 302-03.

In the ensuing 140 years, this Court has consistently recognized the binding effect of these traditional class action judgments, provided that absent class members were adequately represented. *See, e.g., Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915); *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146 (1917); *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66 (1938); *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921), *overruled in part on other grounds, Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941). In *Hansberry v. Lee*, 311 U.S. 32 (1940), the Court acknowledged that a "class" or "representative" suit was a "recognized exception" to the general rule that an *in personam* judgment can have no binding effect on persons not parties to the proceeding. *Id.* at 40; *see also Richards v. Jefferson Cty.*, 517 U.S. 793, 798-99 (1996); *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) (both reaffirming *Hansberry*).

None of these cases recognized or even suggested that due process required the right to opt out of a traditional class action. *See* Herbert B. Newberg & Alba Conte, 1 *Newberg on Class Actions* §§ 1.09, 1.21 (1992) (describing "limited fund and other no opt-out class actions" recognized under former Equity Rule 38 (adopted in 1912)). Rather, as set forth in *Hansberry*, the critical precondition for binding

absent class members in this type of class action was adequacy of representation. 311 U.S. at 42-43. While other cases generally suggest that due process also requires reasonable notice of the proceeding and the opportunity to object or participate,[5] none suggests a general due process right to opt out where the requisites of a traditional equitable class action are present.

The modern "opt-out" class action is of much more recent vintage, having as its precursor the so-called "spurious" class action first recognized in Rule 23 of the original Federal Rules of Civil Procedure adopted in 1938. This was essentially a permissive joinder device, designed as a vehicle to facilitate simultaneous adjudication of actions at law involving common issues, binding only to the extent that absent class members affirmatively opted *into* the class. *See Newberg on Class Actions, supra*, § 1.09. The 1966 amendments, which introduced the current federal rules, retained this device under Rule 23(b)(3), but substituted an opt-out procedure for the opt-in procedure provided in the 1938 rules.

Significantly, both the 1938 rules and the 1966 amendments also retained the traditional equitable non-opt-out class actions recognized at common law. The modern versions of these procedures are contained in Rules 23(b)(1) and (b)(2). As discussed in the next section, the traditional limited fund class action is specifically encompassed in Rule 23(b)(1)(B), the provision on which the district court below relied and under which the district court in Alaska certified the mandatory punitive damages class in *EXXON VALDEZ*.

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[5] *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

B. Modern Cases Under Rule 23(b)(1)(B).

Rule 23(b)(1)(B) expressly authorizes the certification of a mandatory (*i.e.*, non-opt-out) class where:

> The prosecution of separate actions . . . would create a risk of . . . adjudications with respect to the individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Fed. R. Civ. P. 23(b)(1)(B).

This subsection "takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter." *Advisory Committee's Note to Proposed Amendments to Rule 23*, 39 F.R.D. 69, 100-01 (1966). The Advisory Committee contemplated specifically that this rule would apply in cases involving competing claims against a "limited fund":

> In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. *This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims.* A class action by . . . representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem.

Id. at 101 (emphasis added).

As noted above, courts have applied the rule in a variety of contexts, including mass tort actions where the record establishes a substantial risk that individual actions by early claimants would so deplete the defendant's resources as to prejudice recoveries by later claimants. *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 739 (1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992); *In re Granada Partnership Sec. Litig.*, 803 F. Supp. 1236, 1244 (S.D. Tex. 1992); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407, 1418 (E.D.N.Y. 1989), *aff'd*, 907 F.2d 1295 (2d Cir. 1990); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 712-13 (E.D. Mich. 1985); *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45-46 (E.D. Ky. 1977).[6]

In such cases, certification of mandatory "limited fund" classes under Rule 23(b)(1)(B) prevents the "unseemly race to the court room door with monetary prizes for a few winners and worthless judgments for the rest." *Coburn*, 77 F.R.D. at 45. As the court of appeals below recognized, "[l]imited-fund class actions effect a pro-rata reduction of all claims in order to treat all claimants fairly. Thus, they sound in equity even though the relief they provide necessarily affects the amount of money damages the claimants can ultimately receive." *In re Asbestos Litig.*, 90 F.3d 963, 986 (5th Cir. 1996). The procedure closely resembles actions for interpleader, for limitation of liability

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[6] Other courts, while holding open the possibility of such certification on a proper showing, have denied certification under Rule 23(b)(1)(B) on the ground that the record did not establish the requisite limited fund. *E.g., In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 305-06 (6th Cir. 1984); *Jenkins v. Raymark Indus. Inc.*, 109 F.R.D. 269, 276-77 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986).

in admiralty, and on the filing of a final account of a trustee or executor, as to which it is well established that absent parties may be bound without any right to opt out. *Id.* at 987; *In re Joint E. & S. Dist. Asbestos Litig. (Findley)*, 878 F. Supp. 473, 478 (E. & S.D.N.Y. 1995), *aff'd in part and vacated in part on other grounds*, 78 F.3d 764 (2d Cir. 1996); 1 *Newberg on Class Actions*, *supra*, § 20.14; *cf. Mullane*, 339 U.S. at 311-13.

As also noted above, courts have extended this principle to situations where punitive damages are sought by multiple claimants for a single tort and there is a risk that the first tried claims would exhaust the legal limit on the aggregate amount of punitive damages awardable. The rationale was well articulated by Judge Weinstein, who certified such a class in the *In re "Agent Orange"* tort litigation:

> There must be . . . some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction . . . . At the very least, a trial court passing on future claims may admit evidence as to the payment of prior awards which may be used by a jury to reduce an award to a party seeking additional punishment for the same conduct . . . . There is, therefore, a substantial probability that "adjudication with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudication." Accordingly, a class of all [claimants] . . . [is] certified under [Rule 23](b)(1)(B) . . . for the award of punitive damages.

In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1983) (quoting Fed. R. Civ. P. 23(b)(1)(B)), *mandamus denied sub nom. In re Diamond Shamrock Chem. Co.*, 725 F.2d 858 (1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

This Court, of course, has recently issued a series of decisions confirming that due process indeed limits the amount of permissible punitive damages. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562-63, 569 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

Mandatory class treatment of punitive damages claims is therefore appropriate in cases like *EXXON VALDEZ* where huge numbers of claimants separately demand punitive damages for the same allegedly wrongful conduct. Mandatory certification in such cases not only protects against the inequitable distribution of potential punitive damages among similarly situated claimants, but it also protects the interests of the defendant and of society as a whole in avoiding multiple punishments for the same conduct. The latter concern has vexed courts, while eluding any solution, since the early days of mass torts. *See, e.g., Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-42 (2d Cir. 1967) (Friendly, J.) (warning of danger of punitive damages "overkill" in mass tort cases); *Dunn v. HOVIC*, 1 F.3d 1371, 1385-91, *modified on reh'g*, 13 F.3d 58 (3d Cir. 1993) (discussing concerns expressed about repetitive punitive awards in asbestos cases); *In re School Asbestos Litig.*, 789 F.2d 996, 1004 (3d Cir. 1986) ("powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts").

II. NEITHER *SHUTTS* NOR ANY OTHER DECISION OF THIS COURT REQUIRES AN ABSOLUTE OPT-OUT RIGHT IN CLASS ACTIONS INVOLVING *IN PERSONAM* MONETARY CLAIMS AGAINST A LIMITED FUND.

Petitioners' claim that due process requires an absolute right to opt out in any class action involving wholly or predominantly *in personam* claims for money damages finds no support in this Court's prior cases. Petitioners read far too much into *Shutts*, which concerns not the right to opt out generally, but only the requirements for adjudicating *in personam* claims of individual litigants over whom a forum state has no independent basis for asserting personal jurisdiction.[7] The *Shutts* reasoning plainly has no

[7] It bears note, moreover, that the *Shutts* opinion discusses jurisdictional constraints in the context of *state* court class actions only. Federal courts often have broader jurisdictional reach than the courts of the states in which they sit, as when Congress has enacted statutes authorizing nationwide service of process. *See United States v. Union Pac. R.R. Co.*, 98 U.S. (8 Otto) 569, 603-04 (1878) ("nothing in the Constitution ... forbids Congress to enact that ... any [district court] ... shall, by process served anywhere in the United States, have the power to bring before it all the parties necessary to its decision"); *e.g.*, 28 U.S.C. § 2361; *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974) (court's jurisdiction over federal securities claims extends to all persons having minimum contacts with the United States). Likewise, in cases involving pre-trial transfers under 28 U.S.C. § 1407, the federal multidistrict litigation statute, courts have held that a transferee court may constitutionally exercise jurisdiction, for pre-trial purposes including settlement, over all persons having minimum contacts with a transferor forum. *See In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1434-35 (2d Cir. 1993); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987); *but see Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (applying *Shutts* where mandatory settlement class was certified by § 1407 transferee court; no discussion of possible jurisdiction based on class member's minimum contacts with transferor forum), *cert. dismissed*, 511 U.S. 117 (1994).

applicability in cases where a federal court exercises jurisdiction over a *res*, thereby acquiring exclusive, equitable jurisdiction over all *in personam* claims against the *res*.[8]

In analogous proceedings, the existence of a federal maritime court's exclusive jurisdiction over a "limited fund" and, consequently, over all *in personam* claims against that fund is long recognized. In a limitation of liability suit in admiralty, where the claims against a vessel and its owner arising from a maritime tort may exceed the value of the vessel and its freight, the court acquires jurisdiction exclusive of all other courts "to marshall all claims, whether of strictly admiralty origin or not, and to give effect to them by the apportionment of the *res*." *Just v. Chambers*, 312 U.S. 383, 386 (1941); *Hartford Accident & Indem. Co. v. Southern Pac. Co.*, 273 U.S. 207, 215 (1927). The court's jurisdiction in such situations to apportion a *res* accordingly has been held to extend to "cases of personal injury and death . . . [and to] tort claims even when the tort is non-maritime." *Just*, 312 U.S. at 386.[9]

[8] To the extent petitioners and their supporting *amici* assert that an *in personam* claim which "merely seeks a money decree . . . cannot be a '*res*,'" they are "mistaken." *Brooklyn Trust Co. v. Kelby*, 134 F.2d 105, 116 (2d Cir.) ("no matter how inadequate '*res*' may be as a descriptive label, it is not true that a money claim '*in personam*' cannot be a '*res*'"), *cert. denied*, 319 U.S. 767 (1943). Nor is actual "possession" a prerequisite to the court's continuing and exclusive jurisdiction over the *res*. *See Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 85-88 (1992).

[9] *See also Hartford*, 273 U.S. at 217 (limitation "looks to a complete and just disposition of a many-cornered controversy, and is applicable to proceedings in rem against the ship, as well as to proceedings *in personam* against the owner"); *Guillot v. Cenac Towing Co.*, 366 F.2d 898, 906 (5th Cir. 1966) (jurisdiction extends to claims against shipowner's insurer where there is a real risk that separate suits may exhaust the shipowner's coverage).

The *Shutts* reasoning likewise does not apply in cases where class members have minimum contacts with the forum state ,[10] (as was indisputably so in the *EXXON VALDEZ* case) where the class members have expressly or impliedly waived any jurisdictional objection,[11] where they are subject to nationwide service of process (such as in statutory interpleader suits) or to a long-arm statute of the forum state,[12] or where they are otherwise subject to the forum court's jurisdiction.[13]

It bears emphasis, moreover, that the Court in *Shutts* expressly declined to extend its jurisdictional holding to class actions seeking "equitable relief," 472 U.S. at 811 n.3,[14] and the case concededly did not involve a limited fund. *See id.* at 820 ("there is no specific identifiable *res* in Kansas, nor is

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[10] *See Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 n.8 (3d Cir. 1994).

[11] *See DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175-76 (8th Cir. 1995); *White v. National Football League*, 41 F.3d 402, 407-08 (8th Cir. 1994); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d at 292.

[12] *See supra* note 7.

[13] *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 78 F.3d 764, 777-78 (2d Cir. 1996) (*quasi in rem* jurisdiction over claims of beneficiaries of a trust created in the forum state).

[14] *See* 1 *Newberg on Class Actions*, *supra*, § 1.21; *cf. Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994) ("In a Rule 23(b)(2) class action for equitable relief, the due process rights of absent class members generally are satisfied by adequate representation alone").

there any limited amount which may be depleted before every plaintiff is compensated").[15] More recent cases, analogizing limited fund class actions under Rule 23(b)(1)(B) to their equitable antecedents, have concluded that *Shutts* does not mandate an absolute opt-out right.[16]

III. THIS IS NOT AN APPROPRIATE CASE IN WHICH TO CONSIDER THE PROPRIETY OF RULE 23(b)(1)(B) CERTIFICATION OF A MANDATORY PUNITIVE DAMAGES CLASS.

Given a proper reading of *Shutts*, Exxon does not believe there is any constitutional basis on which to preclude certification under Rule 23(b)(1)(B) of the mandatory class in this case. As already discussed, *Shutts* did not consider the right to opt out generally or in the context of Rule 23(b)(1)(B). Whether the Court agrees or disagrees, however, Exxon respectfully urges it to avoid issuing any opinion that could cast doubt on the viability of mandatory classes in limited fund cases involving multiple litigants claiming punitive damages arising from a single course of conduct. Such cases differ fundamentally from mandatory class actions involving claims for compensatory damages

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[15] The same is true of *Brown*, the other principal case on which petitioners rely. *See* 982 F.2d at 389 & n.2 (applying *Shutts* in non-limited fund case certified under Rules 23(b)(1)(A) and 23(b)(2), but *not* 23(b)(1)(B)).

[16] *See In re Orthopedic Bone Screw Prod. Liab. Litig.*, 176 F.R.D. 158, 180-81 (E.D. Pa. 1997); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. at 714; *see also* 1 *Newberg on Class Actions*, *supra*, § 1.18 ("actions by or against similarly situated persons to allocate pro rata an available fund that is insufficient to pay all claims, such as those . . . under Rule 23(b)(1)(B), are equitable in nature, though they involve money claims individually. . . . Accordingly, *Shutts* jurisdictional standards generally do not apply. . . .").

from a limited fund and therefore should be considered separately.

As this Court has often stated, due process "is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). It, "unlike some legal rules, is not a technical conception with fixed content unrelated to time, place and circumstances," *id.*, but instead involves a weighing of interests, both public and private, *id.*, the purpose of which is to ensure "fundamental fairness." *Walters v. National Assoc. of Radiation Survivors*, 473 U.S. 305, 320 (1985). The key question is whether there is a risk to a private interest that is serious enough, in light of competing public and private interests, to warrant an additional procedural safeguard. *Walters*, 473 U.S. at 320-21; *Mathews*, 424 U.S. at 341-48.

In this case, petitioners argue that mandatory class certification violates due process rights because it precludes class members from separately prosecuting their claims before and to the exclusion of competing class members. In the context of *compensatory* damages, this argument is weak: certification of a mandatory limited fund class under Rule 23(b)(1)(B) "impairs" the private interests of individual litigants only to the extent necessary to prevent the disproportionate impairment of identical private interests of other similarly situated, equally deserving claimants. Thus, any "cost" to individual claimants resulting from the certification of a mandatory class would be precisely balanced or outweighed by the "costs" to later claimants -- making a persuasive case *against* any absolute opt-out right. *Mathews*, 424 U.S. at 348; *see also Walters*, 473 U.S. at 320-21 ("we have emphasized that the marginal gains from affording an additional procedural safeguard often may be

outweighed by the societal cost of providing such a safeguard").

But petitioners' arguments move from weak to nonexistent when they are applied to *punitive* damages claims. Such claims affect no "private interests" at all -- and thus present no risk of the deprivation of a private interest that, under *Mathews*, may be weighed in the due process calculus. Punitive damages vindicate not private interests, but the quintessentially sovereign right of the "public" to punish and deter misconduct. They are "fundamentally collective," *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1333 (5th Cir. 1995), and "are awarded for the public benefit -- the collective good." *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1358 (11th Cir. 1996). "[T]he state and not the victim is considered the true party plaintiff." *Id.* A punitive damage claim is therefore never a *private* claim; rather, a plaintiff who seeks punitive damages acts, by definition, as a "private attorney general" to protect a "public interest." For this reason, a state has been held to have the power to eliminate punitive damages claims altogether. *In re Paris Air Crash*, 622 F.2d 1315, 1319-20 (9th Cir. 1980) (Kennedy, J.). As the *Paris* court said:

> [T]he wrongful death statute allows full compensation for loss of companionship and financial support. Plaintiffs seek in addition . . . the opportunity to act as private attorneys general to effect the deterrence and retribution functions of [the state's punitive damage law]. *So far is this right from being a fundamental personal right that it is an interest not truly personal in nature. It is rather a public interest* . . . .

Id. (emphasis added); *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) ("Punitive damages by definition are not intended to compensate the

injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct").

Accordingly, even if petitioners were correct -- which they are not -- that as a matter of constitutional due process the private interests of a few claimants in recovering compensatory damages could override the interests of society and of other claimants in the equitable apportionment of a limited fund, such considerations could have no force in the case of *punitive* damages, which are imposed for public, not private, reasons. The Court therefore should ensure that its decision in this case does not inadvertently affect the situation, quite different from the one present here, of a mandatory punitive damages class, where the "limited fund" is not the defendant's assets, but rather the constitutional limit on the amount of punitive damages that may be imposed. *BMW*, 517 U.S. at 562-63, 569; *Oberg*, 512 U.S. at 420.[17]

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[17] The remaining reasons that petitioners and their supporting *amici* give for uniformly precluding Rule 23(b)(1)(B) certification in limited fund cases are equally deficient in the context of a mandatory punitive damages class. The bankruptcy laws plainly cannot justify any prohibition where the fund against which there are competing claims is limited not by the defendant's assets, but rather by due process (in the case of punitive damages claims) or by some other legal limitation. Nor is the Seventh Amendment any constitutional barrier to mandatory class certification where, as occurred in the *EXXON VALDEZ* litigation, the class members claim's are actually tried to a jury, or where the right to jury trial is preserved but the claims are settled before trial.

CONCLUSION

For all the reasons stated above, *amicus curiae* Exxon Corporation respectfully urges the Court to affirm the judgment below. At a minimum, the Court should make clear that due process does not preclude certification under Federal Rule of Civil Procedure 23(b)(1)(B) of mandatory punitive damages classes such as the class certified in the *EXXON VALDEZ* litigation.

Respectfully submitted,

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